

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1064 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SHIRISHKUMAR M MODI

Versus

STATE OF GUJARAT

Appearance:

MR SK JHAVERI for Appellant
MR D.N. PATEL, ASSTT. GOVERNMENT PLEADER for Respondent No. 1
MR YS LAKHANI for Respondent No. 3, 4, 5

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

Date of decision: 10/08/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

This is an appeal filed by the appellant who was a Special Public Prosecutor appointed by the State Government in some cases, against the judgement and order dated 1st August, 1997 of the learned Single Judge of

this Court in Special Criminal Application No. 812 of 1997, quashing and setting aside his appointment as the Special Public Prosecutor in Sessions Case Nos. 5/96, 6/96 and 7/96.

When this matter was called out alongwith it's cognate appeal which was filed by the State Government, being LPA No. 1086/97, the State Government, through the learned Assistant Government Pleader, placed instructions on record to withdraw that appeal and thus, gave up their challenge against the decision of the learned Single Judge, setting aside the appointment of the present appellant as Special Public Prosecutor to conduct the aforesaid cases. The State Government was allowed to withdraw that appeal by a separate order. The present appellant however has, as is made clear through his learned Counsel, not with a view to continue as a Special PP but with a view to vindicate his honour, chosen to pursue this appeal.

It is not necessary for the purpose of deciding this appeal to enter in to the detailed controversy as regards the allegations made against various accused persons of these Sessions cases. For the purpose of the present appeal, it is sufficient to note that the main prayer which was sought in the Special Criminal Application No.812/97 was for a writ of quo-warranto for setting aside the appointment of the present appellant as a Special Public Prosecutor for conducting the aforesaid cases, and, for a writ of mandamus on the State Government to appointment the regular Public Prosecutor/Additional Public Prosecutor for conducting the cases. From the very nature of the reliefs which were sought in this petition, it is clear that the appellant was vitally concerned with its outcome. The petitioner had therefore, rightly impleaded the present appellant as a party respondent No.3 in the main petition. However, the learned Single Judge allowed the petitioner to delete the respondents Nos. 2 and 3 "for the time being" and issued notice on 4.7.1997 to the other respondent and made it returnable on 8th July, 1997. A copy of that order is at Annexure "A" in the present appeal. The effect of this was that the present appellant had no opportunity of being heard in the petition, in which his appointment was challenged. Since the appellant was deleted as respondent No.3 from the petition, the notice which was issued was not served on him. Notwithstanding this fact, the learned Single Judge proceeded to hear the petition against the appellant's appointment and by it's impugned decision, has set aside the same.

In the impugned judgement, there are certain observations made against the appellant which are the basis of the impugned decision and therefore, we would like to reproduce them hereunder, to indicate that adverse findings have been reached against the appellant though he was not a party to the petition:-

"When the Application Ex.31 was heard, it was the said Special PP namely - Shri Modi, who argued on behalf of the prosecution and went all the way to submit that the Sessions Court cannot take cognizance of the alleged offences against Ishwarbhai Harjibhai and Liladhar Harjibhai. The Ld. Special PP making a submission of this nature would naturally raise suspicion amongst the remaining accused as to the question about fair trial"

"The aforesaid Special PP by the order (sic) dated 4.12.1995, moved the trial Court to the effect that it is the State who is going to challenge the said order dated 15.11.1995 of the trial Court before the High Court in the form of Revision. It is indeed very strange that PP is challenging the order of the Sessions Court passed against the accused who, in fact, are going to be prosecuted by that very PP."

"Without, therefore, entering into the averments made in the petition as to the political interference and appointment of Spl. PP having been made at the instance of some local elements exercising adequate political influence, in the interest of justice and to see that criminal cases against respective accused at present pending before the Court of Ld. Sessions Judge, Banaskantha at Palanpur are conducted not only fairly, but they should appear to have been conducted fairly and in the background of the fact that in the cases where said two accused namely Ishwarbhai and Liladhar are involved, Spl. PP in no uncertain terms has expressed his bias in their favour that the present petitioners are accused, his appointment cannot be permitted to continue."

"If it is so, so far as present petitioners accused are concerned, it will certainly be a matter of great concern for them as well as from their point of view, a big hurdle because PP

appointed specially is acting in a manner so as to let go some of the accused and as a consequence of it, would naturally implicate others. This sort of selective attitude is never expected of a PP."

"When this primary duty is sought to be exercised through the agency of Spl.PP, is understood by the said Ld. PP to give him an opportunity of siding some of the accused for whom, in fact, he should try to bring home the charges levelled against them. When cases are so intermingled and particularly accused are common in all the three cases, obviously his appointment in none of the cases can be permitted."

It will thus, be seen from the impugned decision that the theme underlying therein is that the Special Public Prosecutor Mr.Modi was biased in favour of the accused persons Ishwarbhai and Liladhar and that he was acting in a manner not expected of a Special Public Prosecutor. There is a clear allegation of selective attitude against the learned Public Prosecutor and of siding with some of the accused. These are serious aspersions which are cast upon the learned Special Public Prosecutor without his having any opportunity to deal with them or to deal with the allegations made against him in the writ petition. Even if the petitioners were given leave to amend and chose to, as it apparently appears from the record, to delete the respondent No.3, the learned Single Judge could not have made any such observations casting serious aspersions on the learned Special Public Prosecutor, much less could he have set aside his appointment as the Special P.P. without hearing him. The impugned decision cannot therefore be sustained and is hereby set aside. The appeal is accordingly allowed.

Since the petitioner has chosen to delete the respondent No.3 in the petition, the reliefs prayed for in the petition for removing the appellant as the Special Public Prosecutor cannot be granted against him. However, it appears that when the learned Single Judge allowed the petitioner to delete the respondent No.3, it was mentioned in that order dated 4.7.1997 that this leave to delete the respondent at that stage was being granted "for the time being". This leaves the door open for the petitioner to reimplead the respondent No.3, if they choose to prosecute the matter any further before the learned Single Judge. However, the State Government in its LPA which was withdrawn today, had shown that they

had accepted the decision of the learned Single Judge, setting aside the appointment of Mr.Modi as a Special Public Prosecutor. It is clear that Shri Modi would not be keen to continue if the State Government did not desire to retain him as a Special Public Prosecutor. The matter has been lingering on and therefore, without making any prestige issue of the matter, it would be appropriate on the part of the State Government to ensure that the trials against the accused persons are not delayed any further and necessary arrangements are made in the matter in that regard to ensure that the trials of these Sessions cases are completed soon. Interim relief, if any, stands vacated.

* /Mohandas